

STATE OF MICHIGAN
COURT OF APPEALS

LESLEY JAGO, as Personal Representative of the
Estate of MICHAEL JOHN JAGO II, Deceased,

UNPUBLISHED
August 2, 2011

Plaintiff-Appellee/Cross-Appellant,

v

No. 297880
Court of Claims
LC No. 09-000029-MZ

DEPARTMENT OF STATE POLICE,

Defendant-Appellant/Cross-
Appellee.

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In this wrongful death action, defendant Department of State Police appeals as of right, and plaintiff Lesley Jago, as personal representative of the estate of her husband Michael John Jago II (Jago), cross appeals by delayed leave granted, the trial court's order granting in part and denying in part defendant's motion for summary disposition under MCR 2.116(C)(7). Under the motor vehicle exception to governmental immunity, a governmental agency is liable only for "bodily injury" or "property damage." At issue in this case is whether under *Wesche v Mecosta Co Rd Comm*, 480 Mich 75; 746 NW2d 847 (2008), a claim for survivor's loss benefits is a form of damages for "bodily injury" or is an independent cause of action. We conclude that survivor's loss benefits are damages for the "bodily injury" suffered by a deceased injured person and, therefore, a governmental agency can be liable for survivor's loss benefits. We further hold in answer to the issue raised on cross appeal that a governmental agency, like any other defendant, is not liable for survivor's loss benefits incurred in the first three years after the date of the accident when the deceased injured person was operating his own vehicle and the vehicle was uninsured. We therefore affirm.

I. FACTS AND PROCEDURAL HISTORY

Late at night on January 26, 2009, Jago was driving his vehicle southbound on County Road 403 near Newberry, Michigan. As Jago entered the M-28 intersection, a patrol vehicle, owned by defendant, broadsided Jago's vehicle. At the time of the accident, Jago's vehicle was not insured under a no-fault insurance policy. Jago died in the accident. His survivors included plaintiff and a young son.

In her second amended complaint, plaintiff claimed that defendant was liable under the motor vehicle exception to governmental immunity for all injuries suffered by Jago and his estate. She asserted those injuries included trauma resulting in death, “wage loss or actual future loss of earnings to the extent that such losses are recoverable in excess of the no-fault statutory monthly and yearly maximums,” and other damages related to the accident to the extent that the damages are recoverable under the no-fault act or the wrongful death act.

Defendant moved for summary disposition under MCR 2.116(C)(7). It began its argument with two “fundamentals” regarding a claim against a governmental agency for the negligent operation of a government-owned vehicle: (1) the plaintiff must satisfy the requirements of the no-fault act and the motor vehicle exception to governmental immunity and (2) a plaintiff’s damages are those allowed under the no-fault act and the wrongful death act, as limited by the governmental tort liability act. Based on these fundamentals, defendant argued that plaintiff had no right to recover any damages because Jago’s vehicle was not insured at the time of the accident. To support this conclusion, defendant relied on the fact that under the no-fault act, noneconomic damages are not available to a driver injured while operating his own uninsured motor vehicle. Further, under the no-fault act, survivor’s loss, a form of first-party benefits, cannot be recovered by the dependents of the deceased injured person if the injured person would not have been entitled to first-party benefits, and damages recoverable by a motorist driving his own uninsured vehicle are limited to the damages listed in MCL 500.3135(3)(a) and (e), neither of which concern excess economic damages. Moreover, defendant maintained the excess economic benefits that plaintiff sought were loss of consortium damages, and the Supreme Court stated in *Wesche* that loss of consortium damages cannot be recovered under the motor vehicle exception to governmental immunity.

In response, plaintiff argued that recovery of damages was governed by the motor vehicle exception and that the requirements of the exception were met: Jago suffered “bodily injury” as the result of the negligent operation of a motor vehicle by an employee of a governmental agency. Because the exception makes liability unconditional when the requirements are met, plaintiff claimed that Jago’s status as an uninsured motorist was irrelevant. Plaintiff further argued that even if the no-fault act applied, the act only precludes an uninsured motorist from recovering noneconomic damages. The act’s prohibition against an uninsured motorist’s recovery of damages, applies to the recovery of noneconomic damages; the prohibition does not apply to the recovery of excess economic damages under MCL 500.3135(3)(c). According to plaintiff, all excess economic damages listed in MCL 500.3135(3)(c) are available to an uninsured motorist.

The trial court granted in part and denied in part defendant’s motion for summary disposition. It granted the motion as to plaintiff’s claim for noneconomic damages. It held that, under *Hardy v Oakland Co*, 461 Mich 561; 607 NW2d 718 (2000), where the Supreme Court held the no-fault threshold requirements must be met in order for a plaintiff to recover noneconomic damages from a governmental agency under the motor vehicle exception, plaintiff was not entitled to noneconomic damages because Jago’s vehicle was not insured by a no-fault policy. It denied the motion as to plaintiff’s claim for excess economic benefits. It held that because plaintiff’s claim for excess economic benefits was not a loss of consortium claim, but rather a claim for wage loss or future loss of earnings, the claim was not barred by the Supreme Court’s decision in *Wesche*.

II. ANALYSIS

On appeal, defendant argues that because the motor vehicle exception to governmental immunity permits recovery only for “bodily injury” and “property damage,” and because survivor’s loss benefits do not compensate the dependents of the deceased injured person for bodily injury or property damage, the trial court erred in denying its motion for summary disposition as to plaintiff’s claim for excess economic benefits. On cross appeal, plaintiff argues that the no-fault act does not limit her right to recovery of damages under the motor vehicle exception and, therefore, the estate is entitled to collect survivor’s loss benefits from the date of the accident.

A. STANDARDS OF REVIEW

We review de novo a trial court’s decision on a motion for summary disposition under MCR 2.116(C)(7). *Grimes v Dep’t of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). Summary disposition is proper under MCR 2.116(C)(7) when the claim is barred by immunity granted by law. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In reviewing a summary disposition motion under MCR 2.116(C)(7), we “consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.” *Id.* “If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred.” *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). We review de novo issues of statutory interpretation. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008).

B. BASIC LEGAL PRINCIPLES

The issues raised by the parties in this case require us to address the interplay between the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, the no-fault act, MCL 500.3101 *et seq.*, and the wrongful death act (WDA), MCL 600.2922. In interpreting statutes, our goal is to ascertain and give effect to the intent of the Legislature. *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and we must enforce the statute as written. *Ameritech Publishing, Inc v Dep’t of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008).

Under the GTLA, a governmental agency is immune from tort liability when the agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Bennett v Detroit Police Chief*, 274 Mich App 307, 315; 732 NW2d 164 (2007). This grant of immunity is subject to six statutory exceptions, *Wesche*, 480 Mich at 84, including the motor vehicle exception, MCL 691.1405. The motor vehicle exception provides:

Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

According to the Supreme Court, the language of MCL 691.1405 is clear: the waiver of immunity for liability resulting from a governmental employee's negligent operation of a motor vehicle is limited to damages for "bodily injury" and "property damage." *Wesche*, 480 Mich at 84. "Bodily injury" is "a physical or corporeal injury to the body." *Id.* at 85.

The motor vehicle exception provides a broad statement of liability. *Hardy*, 461 Mich at 565. But this broad statement of liability is controlled by restrictions contained in the no-fault act. *Id.*

MCL 500.3135, which sets forth when a person is subject to tort liability arising from the ownership, maintenance, or use of a motor vehicle, provides in pertinent part:

(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

* * *

(c) Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by [MCL 500.3101] at the time the injury occurred.

(3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect is abolished except as to:

* * *

(c) Damages for allowable expenses, work loss, and survivor's loss as defined in [MCL 500.3107 to MCL 500.3110] in excess of the daily, monthly, and 3-year limitations contained in those sections. . . .^[1]

In *Hardy*, the plaintiff was injured when his vehicle was rear-ended by a patrol vehicle driven by a sheriff's deputy. He argued that because of the broad statement of liability contained in the motor vehicle exception, he was not required to show serious impairment of body function

¹ The damages referred to MCL 500.3135(3)(c) are generally referred to as excess economic damages.

before the governmental agency was liable for noneconomic damages. The Supreme Court disagreed. *Hardy*, 461 Mich at 565-566. It stated that the apparent conflict between MCL 500.3135(1) and MCL 691.1405 was resolved by the plain language of MCL 500.3135(3).² *Id.* at 565. It explained:

Subsection 3135([3]) of the no-fault act, which contains the partial abolition of tort liability, opens with the introductory clause, “Notwithstanding any other provision of law . . .” On its face, therefore, this measure reflects the Legislature’s determination that the restrictions set forth in the no-fault act control the broad statement of liability found in the immunity statute. [*Id.*]

Accordingly, the Supreme Court held that in order for a plaintiff to recover noneconomic damages from a governmental entity he must show serious impairment of a body function. *Id.* at 566.

An action for injuries that result in death shall be prosecuted under the WDA. MCL 600.2921; *Wesche*, 480 Mich at 89. The WDA provides:

(1) Whenever the death of a person, injuries resulting in death, or death as described in [MCL 600.2922a] shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in [MCL 600.2922a], and although the death was caused under circumstances that constitute a felony.

* * *

(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. . . .

The WDA acts as a “filter” through which the underlying claim proceeds. *Wesche*, 480 Mich at 88. Thus, any statutory limitations on the underlying claim apply to the wrongful-death action. *Id.* at 89. And specifically, the WDA “does not waive a governmental agency’s immunity

² At the time of the accident in *Hardy*, the language of MCL 500.3135(3) was found in MCL 500.3135(2). *Hardy*, 461 Mich at 565 n 10.

beyond the limits set forth in the underlying statutory exception.” *Id.* at 87. At the same time, damages that would have been available in the underlying action must be recognized in the wrongful-death claim. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 659; 761 NW2d 414 (2008).

C. DEFENDANT’S APPEAL

Defendant argues that because the waiver of governmental immunity in the motor vehicle exception is limited to “bodily injury” and “property damage,” and because survivor’s loss does not compensate surviving dependents for physical injuries or for property damage, plaintiff’s claim for excess economic benefits, i.e., survivor’s loss incurred three years beyond the date of the accident, does not fall within the motor vehicle exception to governmental immunity. We disagree.

Defendant’s argument is premised on *Wesche*, 480 Mich 75, where the Supreme Court addressed the issue whether the motor vehicle exception allows a claim for loss of consortium against a governmental agency. In *Wesche*, a governmental employee rear-ended the plaintiff-husband’s vehicle, injuring the plaintiff-husband’s spine. The plaintiff-wife, who was not in the vehicle at the time of the accident or at the accident scene, asserted a claim of loss of consortium as a result of her husband’s injury. The Supreme Court held that the motor vehicle exception did not waive the governmental agency’s immunity for the loss of consortium claim. *Id.* at 85. First, the Supreme Court reasoned that a loss of consortium is not a physical injury to a body; rather, it is a claim for loss of society and companionship. *Id.* Second, the Supreme Court explained that a loss of consortium is not merely an item of damages. It stated that a claim for loss of consortium, while derivative of the underlying bodily injury, has long been recognized as a separate, independent cause of action. *Id.* In reaching its conclusion, the Supreme Court rejected the argument that the motor vehicle exception creates a threshold that, once met, permits recovery for loss of consortium. It reasoned that nothing in MCL 691.1405 “state[s] or suggest[s] that governmental agencies are liable for *any* damages once a plaintiff makes a threshold showing of bodily injury or property damage.” *Id.* at 85-86 (emphasis in original).³

Pursuant to *Wesche*, whether a governmental agency is liable under the motor vehicle exception for excess survivor’s loss depends on whether survivor’s loss is an item of damages for “bodily injury” or whether a claim for survivor’s loss is an independent cause of action. To determine whether survivor’s loss is a form of damages for “bodily injury” or an independent cause of action, we must examine the nature and purpose of survivor’s loss.

Under the no-fault act, an insurer is liable to pay personal protection insurance benefits to its insureds for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. MCL 500.3105(1). “Bodily injury” includes death

³ Although plaintiff contends that *Wesche* was wrongly decided, this Court is bound by the rule of stare decisis to follow the decisions of the Supreme Court. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008).

resulting from the injury. MCL 500.3105(3); *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 243; 293 NW2d 594 (1980).

“Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents.” MCL 500.3112.⁴ The personal protection insurance benefits payable to the injured person are listed in MCL 500.3107. *Belcher*, 409 Mich at 247. These benefits include work loss. MCL 500.3107(1)(b). The personal protection insurance benefits payable to the deceased injured person’s dependents are listed in MCL 500.3108, *Belcher*, 409 Mich at 247, and are known as survivor’s loss.

MCL 500.3108(1) provides:

Except as provided in subsection (2), personal protection insurance benefits are payable for a survivor’s loss which consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of the deceased’s death would have received for support during their dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death and expenses, not exceeding \$20.00 per day, reasonably incurred by these dependents during their dependency and after the date on which the deceased died in obtaining ordinary and necessary services in lieu of those that the deceased would have performed for their benefit if the deceased had not suffered the injury causing death. . . . [T]he benefits payable for a survivors’ loss . . . is not payable beyond the first three years after the date of the accident.

In *Belcher*, 409 Mich at 249, the Supreme Court recognized that survivor’s loss benefits “may fairly be regarded as a partial substitute for work-loss benefits which were or would have been paid to the injured person during his lifetime.” It explained:

A survivor’s loss of support does not accrue until after the injured person’s death. Prior to the injured person’s death, any loss of support a dependent suffers as a result of the injury is neither recognized nor expressly compensated for by the act. Rather, benefits are paid to the injured person for loss of work-related income. The Legislature could have fairly contemplated that in most instances the injured person would use a portion of his work-loss benefit to provide support for his dependents. Benefits paid for a survivor’s loss of support can thus be regarded as a close substitute for funds likely to have been received out of the work-loss

⁴ A dependent is a person who was receiving support and services from the deceased injured person before the person’s death. *Belcher*, 409 Mich at 244. The spouse of the deceased person and the deceased person’s children under the age of 18 are generally conclusively presumed to be dependents. MCL 500.3110(1)(a)-(c).

benefit which would have been paid to the injured person had he survived. [*Id.* at 249.]⁵

With this understanding of the nature and purpose of survivor's loss benefits, we hold that survivor's loss benefits are damages for the "bodily injury" suffered by the person who died in the motor vehicle accident. It cannot be disputed that a person who dies from injuries suffered in a motor vehicle accident has suffered "bodily injury." MCL 500.3105(3). The person has suffered a physical or corporeal injury to the body. *Wesche*, 480 Mich at 85. Because the injuries resulted in death, the no-fault act dictates that benefits, in the form of survivor's loss, are to be paid to the deceased injured person's dependents. MCL 500.3112. Generally, through survivor's loss benefits, the dependents are compensated for the economic support they would have received had the injured person survived. *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 561; 302 NW2d 537 (1981); *Belcher*, 409 Mich at 249. Accordingly, survivor's loss benefits do not compensate the deceased injured person's dependents for injuries that the dependents themselves have suffered. Rather, it compensates the dependents for economic loss suffered by them that resulted from the injured person's death. Moreover, as defendant recognizes, a claim for survivor's loss is not a cause of action separate and independent from the injured person's right to receive benefits. The right to benefits belongs only to one party: it either belongs to the injured person or, in the case of the injured person's death, it belongs to the injured person's dependents. The dependents of the injured person have no right to survivor's loss benefits unless and until the injured person has died. Because survivor's loss is an item of damages for the "bodily injury" suffered by the deceased injured person, the waiver of immunity in the highway exception applies to claims for excess survivor's loss benefits. Accordingly, we conclude that the trial court did not err in denying defendant's motion for summary disposition on plaintiff's claim for excess survivor's loss benefits.⁶

D. PLAINTIFF'S CROSS-APPEAL

⁵ But the amount of survivor's loss benefits is not determined solely by the deceased injured person's wages and salary. In *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 561; 302 NW2d 537 (1981), the Supreme Court stated:

[T]he measurement of § 3108 survivors' loss benefits should include the value of tangible things other than, and in addition to, wages and salary. The dollar value of such items as employer-provided health insurance coverage, pensions, disability benefits, and other tangible things of economic value that are lost to the surviving dependents by reason of the insured's death must be taken into account.

⁶ We do not address or decide whether dependents of a deceased injured person are prohibited from collecting excess survivor's loss benefits when, because the injured person was driving an uninsured vehicle, the dependents are not entitled to survivor's loss benefits in a first-party action. See *Belcher*, 409 Mich at 260-261. This issue was not raised by defendant in its brief on appeal.

On cross-appeal, plaintiff argues that the trial court erred in holding that defendant could only be liable for survivor's loss incurred three years beyond the date of the accident. We disagree.

As already stated, the restrictions set forth in the no-fault act control the broad statement of liability found in the motor vehicle exception. *Hardy*, 461 Mich at 565.⁷ Because he was the owner of the uninsured vehicle involved in the accident, Jago, had he survived, would not have been entitled to be paid personal protection insurance benefits for bodily injury suffered in the accident. MCL 500.3113(b). When the person who suffered bodily injured is not entitled to be paid personal protection insurance benefits, his dependents are not entitled to receive survivor's loss benefits as a personal protection insurance benefit. *Belcher*, 409 Mich 260-261. Because survivor's loss is a personal protection insurance benefit to be paid for three years after the date of the accident by a no-fault insurer, MCL 500.3108(1), the trial court did not err in holding that plaintiff is not entitled to receive survivor's loss for the three years after the date of the accident from defendant.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

⁷ Contrary to plaintiff's assertion, the provision at dispute is not MCL 500.3135(2)(c), which states that noneconomic damages shall not be assessed in favor of a party who, at the time of the accident, was operating his or her own uninsured vehicle. The governing provision is MCL 500.3135(3). This provision sets forth the limited circumstances when tort liability arising out of the use of a motor vehicle has not been abolished; these circumstances include liability for damages for survivor's loss beyond the three-year limitation. MCL 500.3135(3)(c). In *Hardy*, 461Mich at 565, the Supreme Court held that the restrictions of MCL 500.3135(3) control the liability of a governmental agency under the motor vehicle exception.